SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 89-234 Decided April 28, 1989

Appeals from decision of the Utah State Office, Bureau of Land Management, denying protest against decision to conduct a lease sale for oil and gas, including carbon dioxide, on lands within the Escalante Known Geologic Structure.

Appeal dismissed in part; decision affirmed in part, set aside in part, and remanded.

1. Act of Sept. 28, 1984: Generally--Oil and Gas Leases: Generally--Oil and Gas Leases: Competitive Leases--Oil and Gas Leases: Stipulations

   Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be set aside and the case remanded for issuance of leases of the five areas without the stipulation.

2. National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Generally--Oil and Gas Leases: Competitive Leases

   BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS

> announcing that proposals for actual development of the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

APPEARANCES: Rodney Greeno, Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; and David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

This appeal concerns a decision by the Utah State Office, Bureau of Land Management (BLM), to conduct a lease sale for 20 parcels in the Escalante Known Geologic Structure (KGS) near the town of Escalante in Garfield County in south central Utah. The parcels are being offered for leases of oil and gas, including carbon dioxide (CO[2]). The KGS covers 14,000 acres administered by the Cedar City, Utah, District Office, BLM, and 64,200 acres within the Dixie National Forest, administered by the Forest Service, U.S. Department of Agriculture (FS).

The history of this appeal was set out as follows in our order of February 27, 1989, in which we denied appellants' request for suspension of the lease sale and granted expedited consideration:

> [O]n May 4, 1988, following extensive environmental review, [including] preparation of an environmental impact statement (EIS), BLM and FS issued a joint "record of decision" allowing oil and gas and CO[2] leasing in the KGS. It was announced in that document that 20 tracts within the KGS would be offered for lease through an oral bid sale, and that leases would be awarded to the highest bidder on a tract-by-tract basis. This competitive bid procedure is dictated by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), and is in accord with new Departmental regulations set out at 43 CFR Part 3100 (53 FR 22814 (June 17, 1988)).
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> The record of decision announced that it constituted "the Proposed Decision" of BLM and that it was therefore subject to protest to the Director of BLM, "under 43 CFR 1610.5-2." The record of decision indicated that the "Proposed decision will be signed, and become BLM's final Decision, upon expiration of the protest period or upon resolution of any protests received." On or around June 20, 1988, Southern Utah Wilderness Alliance (SUWA), following the instructions in the record of decision, filed a protest with the Director of BLM.
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> As to FS' decision to allow leasing, the record of decision was subject to appeal to the Chief Forester under Department of Agriculture regulation 36 CFR 211.18 (1988). Several parties, including SUWA, filed appeals. In connection with those appeals, the parties requested that the Chief Forester stay the decision

to allow oil and gas leasing. On July 22, 1988, the reviewing officer appointed by the Chief Forester granted the stay, but directed that all actions that are required to hold a lease sale be continued "up to but not including lease issuance."

Thus, while the protest to the Director of BLM and the appeal to the Chief Forester were under consideration, FS and BLM continued to process the tracts for inclusion in a lease sale. On September 13 and 15, 1988, FS sent to BLM special stipulations for each tract, advising that "these stipulations are taken from the Record of Decision * * *, May 4, 1988, and must be attached * * * to any lease issued for this tract." Among these stipulations was Supplemental Stipulation No. 4, restricting surface occupancy or disturbance in an area within 2,640 feet of Hells Backbone Loop Road, but allowing for waiver by FS officers "if circumstances or relative resource values change or if the lessee demonstrates that operations can be conducted without causing unacceptable impacts."

On November 30, 1988, the FS reviewing officer generally denied the appeals, but affirmed one modification suggested by appellants by amending Supplemental Stipulation No. 4 to define the circumstances when lessee can demonstrate that a waiver was appropriate, and providing that, if an exception was granted, the stipulation would be replaced with other site-specific requirements. This decision became final for the Department of Agriculture under 36 CFR 211.18(f) (1988) when the Secretary of Agriculture elected not to review it.

On December 22, 1988, the office of the Director, BLM, wrote to SUWA to inform it that BLM's record of decision had mistakenly cited provisions of 43 CFR 1610.5-2, which apply only to BLM approval of a plan or plan amendment. The Director indicated that BLM's proposed action was subject to protest under 43 CFR 4.450-2, and that this protest was properly considered by the Utah State Director, BLM. The Director accordingly referred the protest to him.

On or around January 6, 1989, SUWA filed an amendment to its protest against BLM's May 4, 1988, proposed decision to approve issuance of oil and gas leases. This amendment restated the issues brought before FS in SUWA's appeal concerning the appropriateness of the stipulations proposed to be placed on any leases issued. On January 10, 1989, the Wilderness Society filed a protest against this proposed decision. It also challenged the stipulations being announced for inclusion in the proposed leases.

On January 12, 1989, BLM issued two brief letter decisions denying the protests of SUWA and the Wilderness Society. BLM stated that the EIS adequately addressed all the issues raised and that it is in compliance with the National Environmental Policy Act of 1969, and the Utah Wilderness Act of 1984.

> On January 13, 1989, BLM formally signed the Record of Decision and issued notice of the lease sale, to be held on February 28, 1989. Twenty parcels (designated UT 001 through UT 020) were listed for bids.
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> On or around February 9, 1989, SUWA filed a notice of appeal from BLM's denial of its protest. Along with this notice of appeal, it requested that the lease sale scheduled for February 28, 1989, be suspended insofar as it concerns Parcel UT 015 and UT 018. [Footnotes omitted.]

As noted above, by order dated February 27, 1989, we denied SUWA's request to suspend BLM's lease sale, and also sua sponte granted expedited consideration. In denying SUWA's request for suspension, we ruled that, even though BLM was free to conduct its lease sale and receive bids, it could not issue any lease on any of the parcels in the lease offering until SUWA's appeal from the denial of its protest was resolved.

Before addressing the merits of the appeal, we consider one procedural matter. As we stated in our interim order, SUWA's notice of appeal purports to be filed not only on behalf of SUWA, but on behalf of the Wilderness Society and the Sierra Club as well. However, the notice of appeal was signed only by Rodney Greeno, who had previously appeared before BLM on behalf of SUWA only.

Under 43 CFR 1.3(b), a person is authorized to "practice" before the Board only if he is an attorney admitted to practice or, inter alia, is practicing in connection with a particular matter on his own behalf or on behalf of an association of which he is an employee. "Practice" before the Department includes any action to support a right on behalf of another person or party (43 CFR 1.2(c)) and, thus, includes the filing of a notice of appeal before this Board. A notice of appeal filed by a person who is not authorized by regulation to practice before the Department is properly dismissed. David D. Beal, 90 IBLA 87 (1985), and cases cited.

As it did not appear that Greeno was an employee of the Wilderness Society or the Sierra Club, that he is a licensed attorney who was authorized to represent those two groups in filing an appeal, or that any of the other circumstances described in 43 CFR 1.3(b)(3) appertained, we directed the Wilderness Society and the Sierra Club to show cause why their appeals should not be dismissed. The Wilderness Society responded, but has not adequately explained its failure to execute a notice of appeal on its own behalf. The Sierra Club did not respond. Accordingly, their appeals are dismissed for want of a timely, cognizable notice of appeal. 43 CFR 4.410.

[1] The lease sale proceeded as scheduled on February 28, 1989. Twenty parcels were offered for sale, all but two of which were put up for "standard oil and gas leasing." The remaining two, parcels 15 and 18, were put up for leasing of CO[2] only. BLM's Notice of Competitive Lease Sale, dated January 13, 1989, set out for each parcel the terms of the protective lease stipulations that were to apply to any lease issued as a result of the sale. Out of the 20 parcels, bids were received for all but Parcel 20.

SUWA objects to all types of leasing within the Escalante KGS, and also challenge BLM's lease sale notice. Specifically, SUWA argues that BLM has misinterpreted the restrictions of section 306 of the Utah Wilderness Act, 98 Stat. 1662. That provision authorizes leasing for CO[2] on five areas for a 5-year period expiring on September 28, 1989. 1/ These five areas are referred to in section 306(a) of the Act as "'Antone Bench Area'" (original in quotations) and "Areas 2, 3, 4, and 5." Section 306 also sets out specific provisions under which these areas must be managed.

Under section 306(a)(3), "exploration in the Antone Bench area shall be permitted only by helicopter or other methods which do not involve road construction or other significant surface disturbance." Under section 306(b), road construction is permitted, with specific limitations, "in the event development of a lease within the Antone Bench area is proposed." Thus, section 306 establishes a critical distinction between "exploration" and "development." In the former, no road construction is permitted; in the latter, construction may be allowed under specific restrictions. In view of the difficulty of restoring areas where roads are constructed, which BLM acknowledges in its EIS, this distinction involves an important environmental issue.

In view of the restrictions of section 306(a)(3), BLM developed the following stipulation, entitled Supplemental Stipulation No. 21:

> Exploration of Areas 3, 4, and 5 will be conducted by helicopter or other methods that do not involve road construction or other significant disturbance. This requirement applies to any well that exceeds the distance from a producing well, or well capable of production, established by the State of Utah rules for gas well spacing or special spacing rules that may be established within the KGS.

SUWA objects because this stipulation was not made applicable either to the Antone Bench Area or to Area 2. Further, it complains that there is no legal basis for establishing the "exploration" standard by reference to State or special spacing rules.

Section 306 of the Utah Wilderness Act defines five areas of land, authorizes the issuance of CO[2] leases for them, and expressly indicates that these five areas "shall * * * be managed in accordance with" certain provisions, including the restriction on permissible methods of "exploration." We hold that this provision requires that these five areas may not be treated differently, as BLM has done here by leasing both the Antone Bench Area and Area 2 without any stipulation governing exploration. Accordingly, insofar as BLM offered the Antone Bench Area and Area 2 for lease without

1/ We shall refer to Antone Bench, and Areas 2, 3, 4, and 5 as "Areas" in order to distinguish them from the "parcels" that BLM created and put up for sale. Thus, BLM put the "Antone Bench Area" up for lease as "Parcel 18"; it put "Areas 2, 3, 4, and 5" up together for sale as "Parcel 15."

imposing identical stipulations to those imposed on Areas 3, 4, and 5, its decision was in error. 2/

BLM's record of decision explained its decision not to impose a stipulation enforcing section 306(a)(3) on a lease covering the Antone Bench Area:

> Section 306(a)(3) of the Utah Wilderness Act of 1984, already requires that exploration in the Antone Bench Area shall be permitted only by helicopter or other methods that do not involve road construction or other significant disturbance. Therefore, leases issued for Antone Bench will not require this stipulation.

BLM's record of decision failed to explain its decision not to impose this stipulation on Area 2. 3/ This explanation is inadequate to justify disparate treatment of the five areas governed by section 306 of the Utah Wilderness Act. While we agree that the very existence of statutory restrictions on lease development, by themselves, will require BLM and FS to enforce such restrictions, these statutory restrictions apply to all five areas alike. Thus, if leases issued for Antone Bench and Area 2 do not require a stipulation because section 306(a)(3) "already requires" that exploration in Antone Bench and Area 2 shall be restricted, then leases issued for Areas 3, 4, and 5 do not require a stipulation either.

In its answer, BLM asserts that Supplemental Stipulation No. 21 is a different stipulation than that found in the Utah Wilderness Act, and is not intended to be an interpretation of the language in the Utah Wilderness Act.

2/ The language of section 306 is admittedly ambiguous as to what restrictions apply to which areas. Section 306(a) recognizes five discrete "areas," called "the 'Antone Bench Area'" (quotes in original) and "Areas 2, 3, 4, and 5." Section 306(a)(1) refers to "the Areas," which term we take from the context to mean all five of these "areas." Section 306(a)(2) refers to "the Area," which term we again take from the context to mean all five of the areas. Section 306(a)(3) and 306(b) refers to the "Antone Bench area," which we also take to be a general term meaning all five of the areas. Thus, we distinguish between the terms "Antone Bench area" and the all-capitalized quoted term "'Antone Bench Area'" which appears in section 306(a) in reference to the discrete area. Notwithstanding the ambiguity, we regard section 306(a) as imposing the enumerated restrictions (including the restriction on exploration) on all five of the "areas" identified therein.

3/ However, these statements may be extended to explain BLM's decision not to impose Supplemental Stipulation No. 21 on Area 2. Area 2 is apparently situated on the north portion of a geologic feature that also contains the Antone Bench Area. Evidently, despite the fact that the Utah Wilderness Act and all of BLM's planning maps differentiate between Area 2 and the Antone Bench Area, BLM chose in this instance to apply the term "Antone Bench" to the entire geologic feature. Under its construction, it was not necessary to impose a protective stipulation on Area 2 because section 306(a)(3) automatically applies to it as part of the Antone Bench.

Rather, BLM argues, it is simply a different requirement not mandated by the statute, but which BLM has chosen to impose through the existence of its administrative authority on Areas 3, 4, and 5. We find this unpersuasive, as we view the stipulation as a plain effort to interpret the requirements of section 306 of the Utah Wilderness Act. Under section 306(b), roads may be built in the Antone Bench area only "in the event development * * * is proposed." Section 306(a)(3) provides that "exploration" shall be permitted in the Antone Bench area only by helicopter or other methods which do not involve road construction. Supplemental Stipulation No. 21 in effect makes this distinction by providing that the strict no-construction requirement will apply to any well not within a certain distance of a producing well, or a well capable of production. The stipulation also establishes a standard (state or unit well-spacing rules) for determining what distance to use. Although it does not expressly address the difference between "exploration" and "development," Supplemental Stipulation No. 21 clearly has the effect of enforcing this distinction as contemplated by section 306.

We have held that BLM erred by failing to impose a similar restrictive stipulation on all five areas governed by section 306. The issue remains whether BLM's error can be cured simply by imposing Supplemental Stipulation No. 21 to all five areas identified in section 306. SUWA asserts that this stipulation violates the protections intended by Congress in section 306 and argues that its imposition is without legal authority, pointing out that BLM has never explained how the stipulation would operate to achieve the protective purposes of this section.

We agree with SUWA that it is not possible to affirm the imposition of Supplemental Stipulation No. 21. The stipulation appears to apply what SUWA describes as "traditional oil and gas law concepts" of "exploration wells" and "discovery wells" from the context of determining drilling obligations and entitlements in lease unitization. While these criteria may have some relevance to a determination of whether a proposed activity in the Antone Bench area is "exploration" or "development," we are not satisfied either that unitization concepts as to the purposes for which wells are drilled should necessarily control, or that the use of state or unit spacing provisions, by themselves, will adequately address the issue of whether activity on these areas is "exploration" or "development" as the terms are used in the context of section 306. 4/ For example, "exploration" is not

4/ Even if we were to allow the use of unitization concepts as controlling, there would be substantial questions about using state spacing or unit spacing requirements to decide the issue. According to Williams & Meyers, a "development well" is "any well drilled within the presently known or proved productive area of a pool (reservoir) as indicated by reasonable interpretation of subsurface data, with the objective of obtaining oil or gas from that pool." 5 H. Williams & C. Meyers, Oil and Gas Law, § 847, at 381. A "development well" refers to "a well drilled with the expectation of producing from a known productive formation, and which is located in accordance with spacing regulations and field development requirements." 8 H. Williams & C. Meyers, Oil and Gas Law Manual of Oil and Gas Terms, at 334-35. On the other hand, an "exploratory well" is "a well drilled in an unproven or

necessarily synonymous with the drilling of an "exploration well," but may include seismic testing; "development of a lease" is not necessarily synonymous with the drilling of a "development well," but may include construction of pipelines.

Accordingly, we set aside BLM's decision to offer Areas 3, 4, and 5 subject to Supplemental Stipulation No. 21. As BLM did not impose any specific stipulation on leases of either the Antone Bench Area or Area 2, the effect of our action is to leave all five of the areas governed by section 306 unencumbered by any stipulation governing what is "exploration" or "development." However, we perceive no resulting problem or need to upset the lease sale, because, as BLM notes, the terms of section 306 apply independently of the presence of any restrictive stipulation that might interpret them. The end result of leaving the leases for these areas in force with no stipulation is simply to delay determination of whether any proposed activity on the leaseholds is "exploration" or "development" within the meaning of section 306 until such time as a specific proposal is made by filing an application for permit to drill. Because the factors involved in such determination will likely vary over time depending on what exploration of the area in general reveals, this determination can easily and effectively be made on a case-by-case basis by BLM's or FS' operational personnel, who act as Departmental advisors on geologic issues, at the time a proposal to drill the well is submitted. In this way, geologic data of the type presented by SUWA on appeal concerning the extent that CO[2] has been discovered in the Escalante KGS area might be best analyzed under such an arrangement.

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fn. 4 (continued)
semi-proven territory for the purpose of ascertaining the presence underground of a commercial petroleum deposit." Id.

Supplemental Stipulation No. 21 provides, in effect, that a well will automatically be treated as an "exploratory well" on the mere showing that it is not being drilled within the relevant state spacing distance from a well that is either producing or is capable of production. Use of well spacing requirements seems an unlikely indicium that a wellsite would necessarily be within a known or proven production area. The presence of a productive well within a certain distance of a wellsite would not by itself justify classification of a well as a "development well," for example, where it is being drilled into an entirely different structure at an entirely different depth. See 5 H. Williams & C. Meyers, Oil and Gas Law, § 847, at 382. Conversely, a proposed well might be justified as a "development well," based on compelling geologic data from other producing wells, even where the producing wells are situated some distance from the proposed wellsite.

Along these lines, we also doubt the notion, advanced by SUWA, that some minimum-impact exploration at the site must first demonstrate the presence of a commercially viable CO[2] resource before a well there can be regarded as "developmental." While an exploratory well may become developmental, it does not follow that every developmental well must be preceded by an exploratory well.

In our view, allowing the lease sale to stand while setting aside the stipulation works no hardship on the successful bidders, 5/ who retain their priority for the parcels involved. As the restrictions of sec. 306 apply independently of any restrictive stipulation, the stipulation is, to some extent, irrelevant. If the stipulation is more restrictive than the statute, the prospective lessees are not harmed by its removal. Even if the stipulation were less restrictive than the terms of the statute, its cancellation would not harm the prospective lessees, as the Government could not be barred from imposing the mandatory terms set out by Congress in addressing a specific development proposal.

[3] SUWA also challenges BLM's decision to proceed with the lease sale on several grounds relating to the asserted inadequacy of the EIS prepared in support of the sale by BLM and FS. We reject these contentions.

The EIS did not attempt to consider possible site-specific operating plans, but announced the adoption of a staged environmental analysis approach under which BLM and FS will assess additional impacts from development as necessary and when sufficient information becomes available. By its own terms, the EIS was only the first stage of the analysis process; it clearly stated that approval of future specific proposals for CO[2] or oil or gas field development would be based on an analysis of a field development plan of operations submitted by the lessee or operator. Further, the analysis of potential impacts of field development will be documented in an environmental assessment or environmental impact statement which addresses site-specific impacts of full field development and connected actions such as gas processing plants and CO[2] transportation pipelines.

We have previously affirmed BLM decisions not to prepare an EIS concerning geothermal leasing where, as here, BLM adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Union Oil Co. of California, 102 IBLA 187 (1988); Union Oil Co. of California, 99 IBLA 95 (1987); see Park County Resources Council v. U.S. Department of Agriculture, 613 F. Supp. 1182, 1188 (D. Wyo. 1985), aff'd, 817 F.2d 609 (10th Cir. 1987). Against this background, it is evident that the decision to prepare an EIS in this case at the leasing stage is the product of a cautious approach in a sensitive situation.

We agree with the statement in the EIS that "the issuance of an oil and gas or CO[2] lease does not represent an irreversible or irretrievable commitment of resources protected by nondiscretionary law," and note the assurance therein by FS and BLM that "[a] proposal or plan of operations [will not be] approved if a subsequent analysis concludes that operations cannot be conducted in conformance with the law." As proposals for actual

5/ The record shows that Lockhard & Associates, Inc., was the successful bidder for Parcel 15, which includes Areas 2, 3, 4, and 5. Vern Jones was the successful bidder for Parcel 18, which includes the Antone Bench Area.

development of the leases will be subject to further environmental analysis (which analysis can be made on the basis of up-to-date geologic data rather than on speculative data now available), we are unwilling to interfere with BLM's present decision to offer the parcels for lease sale on the basis of current information.

BLM's decision to hold the lease sale is affirmed, and, except as to parcels 15 and 18, BLM is free to issue leases for these parcels under the terms set out in its Notice of Competitive Sale dated January 13, 1989. As to parcels 15 and 18, BLM should strike Supplemental Stipulation No. 21 and issue leases.

To the extent not specifically addressed herein, SUWA's other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part, and the decision appealed from is affirmed in part, set aside in part, and remanded for action as described above.

David L. Hughes
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge.